IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA

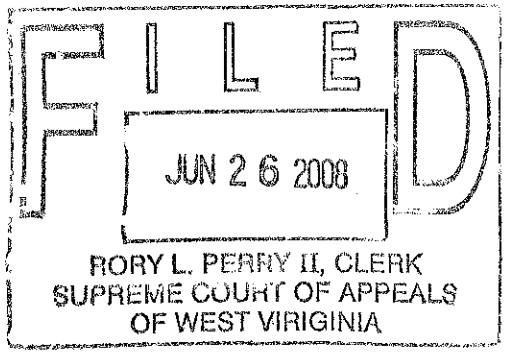
Appellee/Plaintiff Below,

v. Docket No.: 33903

BRIAN KEITH NOLL,

Appellant/Defendant Below.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA



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I. STATEMENT OF THE CASE.

The Appellant was indicted for five (5) felony counts of Burglary, three (3) felony counts of Grand Larceny, one (1) felony count of Conspiracy to Commit Burglary, and two (2) misdemeanor counts of Petit Larceny, for five separate residential burglaries occurring in Berkeley County. [Case No.: 04-F-181.] [1]

The Appellant was found guilty by jury verdict of five indicted felony charges: two counts of Burglary; two counts of Grand Larceny; and one count of Conspiracy to Commit Burglary. He was acquitted of two counts of Burglary and two counts of Larceny.

The Appellant subsequently pleaded guilty to two unrelated misdemeanor counts of Receiving or Transferring Stolen Property, as lesser-included charges of felony indictments in Case No.: 04-F-13.[2]

The Appellant was later sentenced to the statutory sentences for each of the convictions at jury trial, with a mixture of consecutive and concurrent sentences. Each of the two Burglary sentences of one-to-fifteen (1-15) years was paired concurrently with one of the two Grand Larceny sentence of one-to-ten (1-10) years, resulting in an effective sentence of one-to-fifteen (1-15) years for each pair. The two pairs of Burglary/Grand Larceny were then run consecutively to each other, with the one-to-five (1-5) year sentence for Conspiracy to run consecutively, resulting in a total effective sentence for Case No.: 04-F-181 of three-to-thirty five (3-35) years.

By plea agreement, the two statutory one (1) year misdemeanor sentences in Case No.: 04-F-13 were run concurrently with the sentences for Case No.: 04-F-181, resulting in a total

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[1] Counts 8 and 9 of the Indictment (charging one Burglary and one Larceny) were severed for a separate trial. The jury acquitted the Appellant of those counts. That acquittal is not subject of this appeal.

[2] The Appellant does not appeal from the conviction or sentence in Case No.: 04-F-13.

effective sentence for Case Nos.: 04-F-181 and -13 of three-to-thirty five (3-35) years.

The effective date of sentencing is May 31, 2004.[3] The Appellant was resentenced for appeal purposes on May 31, 2006. The Appellant was again resentenced for appeal purposes on April 5, 2007. An additional extension to file the appeal not later than October 4, 2007, was granted on August 1, 2007.

The circuit court's records reflect that no Notice of Intent to Appeal was ever filed. The State filed a Motion to Dismiss with this Honorable Court, pursuant to **W.V.R.App.Pro.** 3(b), based on this failure, which motion was denied by this Court.

The State of West Virginia respectfully requests this Court to affirm the Appellant's convictions.

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[3]According to the records of the West Virginia Division of Corrections, the Appellant is currently paroled.

II. STATEMENT OF THE FACTS AND PROCEEDING BELOW.

1. The Appellant was indicted for five (5) felony counts of Burglary, three (3) felony counts of Grand Larceny, one (1) felony count of Conspiracy to Commit Burglary, and two (2) misdemeanor counts of Petit Larceny, for five separate residential burglaries occurring in Berkeley County. [Indictment, 10/26/04.]

2. The State gave notice to the Appellant of its intent to use **W.V.R.E.** 404(b) evidence which the State believed was intrinsic to the crimes. First, that when the Appellant was interviewed by police about the burglaries he denied any knowledge but was wearing a necklace from a house burgled in Morgan County. Second, that a co-defendant who placed the Appellant at the burglaries stated that the motive was to get money for drugs. The co-defendant was also found in the possession of stolen checks from two of the victims. [Notice of Intent to Use 404B, 2/9/05.]

3. After a McGinnis hearing on the 404(b) motion, the trial court ruled that the State could admit the Appellant's statement of denial of knowledge of the burglaries and that the necklace was seized from the person of the Appellant but could not admit evidence that the necklace was later determined to have come from a Morgan County burglary. The trial court further ruled that the drug motivation was uncontested by the Appellant and was intrinsic to the crime. [Pre-Trial Order, 2/15/05.]

4. The State moved to sever for trial purposes Counts 8 and 9, due to the unavailability of the victims as witnesses. [Motion to Sever, 2/9/05.]

5. At trial on Counts 1-7 and 10-11, during her brief opening statement and without objection, the Prosecutor referenced the four charged burglaries and the Appellant's and his co-

defendants' participation in the plural and as a "burglary ring." Pursuant to the trial court's pre-trial ruling, she referenced that the people involved in these crimes were involved with drugs and that, while denying his involvement in the burglaries, the Appellant was found wearing a chain from a burglary. [Tr., 2/8/05, 84-88.]

6. Steven Kipps testified that: he owned a home in Berkeley County; he was away from the home one day and upon his return found his home was broken into and ransacked; and certain described items were taken from the home. [Id, 96-105.]

7. Andrew Frye testified that: he lives at a home in Berkeley County; his wife returned home one day and found the basement door open and the house quite a mess; all the doors were unlocked and the cabinets and drawers opened; the home was locked when they left; and certain described items were taken from the home. [Id, 106-118.]

8. Trilby Land testified that: she lives at a home in Berkeley County; she returned home one day and her home was broken into, mud on the carpet and two jewelry boxes missing; the home was locked when she left; and certain described items were taken from the home. [Id, 118-132.]

9. Robin Hicks testified that: she lives at a home in Berkeley County; she returned home one day and her home was broken into, packages opened; and certain described items were taken from the home. [Id, 132-145.]

10. State Trooper Bird testified that: he investigated the burglary at Mr. Kipps' and Mr. Frye's homes; he described the damage at the Kipps'; he described property alleged to have been taken from the homes; a woman named Amanda Schultz came forward with information about the burglaries and assisted in the recovery of some of the property; Ms. Schultz identified the

Appellant as being involved in these two burglaries. [Id., 145-158.]

11. State Trooper Burkhart testified that: he investigated the burglary at Ms. Land's home; he described the damage at the Land's; a woman named Amanda Schultz came forward with information about the burglaries and identified the Appellant and Aaron Rockwell as being involved in the burglary; Ms. Schultz identified homes that had been burglarized, including Ms. Land's and assisted in the recovery of some of the property; he knew Ms. Schultz was a heroin user; Ms. Schultz was arrested for unrelated matters at the time she talked. [Id., 158-171.]

12. Berkeley County Deputy Crites testified that: he investigated the burglary at Ms. Hicks' home; he described the damage at the Hicks'; he obtained a list of property taken. [Id., 171-183.]

13. Berkeley County Deputy McCulley testified that: he investigated the burglary at Ms. Hicks' home; he described the damage at the Hicks'; he received some information from Amanda Schultz about some burglaries; Ms. Schultz drove with the deputies to show them houses that had been burglarized, including Ms. Hicks'; he identified some stolen property that was recovered. [Id., 183-188.]

14. State Trooper Bean testified that: he is familiar with both Amanda Schultz and the Appellant; Ms. Schultz cooperated by showing the police various homes in the area that were burglarized; Ms. Schultz described a piece of jewelry taken; the Appellant was wearing that piece of jewelry when he was interviewed; the piece of jewelry was seized and determined to have come from a burglary; Ms. Schultz is a heroin addict and drug user; the Appellant denied involvement in the burglaries; when people are interviewed they are not always forthcoming. [Id., 188-193.]

15. Berkeley County Deputy Lt. Bohrer testified that: he arrested Amanda Schultz; Ms. Schultz identified some people involved in local burglaries, including the Appellant; Ms. Schultz and the Appellant have children together; his investigation is based on reports from the victims and Ms. Schultz; Ms. Schultz is a heroin user. [Id., 194-203.]

16. Amanda Schultz testified that: she is twenty-five years old, has been with the Appellant for eleven years and has three kids with him; she has been convicted of forgery, burglary and grand larceny; she took a plea and agreed to cooperate with the State; she accompanied law enforcement officers regarding homes that were burglarized; she identified photographs of certain homes that the Appellant showed her or told her that he had broken into with Aaron Rockwell, which photographs were previously identified as the Land's and Hicks' homes; property was sold or traded for drugs; she has also been convicted of misdemeanor false pretenses; she and the Appellant are heroin users. [Id., 203-260.]

17. The State rested. [Id., 260.]

18. The Appellant moved for acquittal, which motion was denied by the court. [Id., 261-266.]

19. The defense rested. [Tr., 2/9/05, 9.]

20. After deliberation, the jury returned a verdict finding the Appellant guilty of Counts 3-7 (two counts of Burglary, two of Grand Larceny and one of Conspiracy), and not guilty of Counts 1 and 2 and 10 and 11 (two counts of Burglary and two of Larceny). [Verdict Form, 2/9/05.]

21. The Appellant was later sentenced to the statutory sentences for each of the convictions at jury trial, with a mixture of consecutive and concurrent sentences. Each of the two

Burglary sentences of one-to-fifteen (1-15) years was paired concurrently with one of the two Grand Larceny sentences of one-to-ten (1-10) years, resulting in an effective sentence of one-to-fifteen (1-15) years for each pair. The two pairs of Burglary/Grand Larceny were then run consecutively to each other, with the one-to-five (1-5) year sentence for Conspiracy to run consecutively, resulting in a total effective sentence for Case No.: 04-F-181 of three-to-thirty five (3-35) years. [Sentencing Order, 6/15/05.][4]

22. The Appellant was resentenced for appeal purposes on May 31, 2006. [Resentencing Order, 5/31/06.]

23. The Appellant was again resentenced for appeal purposes on April 5, 2007. [Resentencing Order, 4/5/07.]

24. An additional extension to file the appeal not later than October 4, 2007, was granted on August 1, 2007. [Uncaptioned Order, 8/1/07.]

25. This Court accepted the Petition for Appeal for argument.

26. The State of West Virginia respectfully requests this Court to affirm the jury's convictions of the Appellant.

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[4] By plea agreement, the two statutory one (1) year misdemeanor sentences in Case No.: 04-F-13 were run concurrently with the sentences for Case No.: 04-F-181, resulting in a total effective sentence for Case Nos.: 04-F-181 and -13 of three-to-thirty five (3-35) years. The Appellant does not appeal the convictions or sentences from 04-F-13.

III. ISSUES PRESENTED.

A. WHETHER EVIDENCE OF EACH OF FOUR BURGLARIES FOR WHICH THE APPELLANT WAS BEING TRIED IN A UNITARY TRIAL WAS PROPERLY NOTICED AND ADMITTED AND EVIDENCE THAT THE APPELLANT WAS WEARING A NECKLACE IDENTIFIED AS THE PRODUCT OF A BURGLARY WAS PROPERLY ADMITTED WITHOUT OBJECTION IN CONFORMITY WITH THE TRIAL COURT'S PRE-TRIAL RULING?

B. WHETHER THE APPELLANT'S DENIAL TO POLICE IN AN INTERVIEW THAT HE WAS INVOLVED IN BURGLARIES WAS AN EXERCISE OF HIS FIFTH AMENDMENT RIGHT TO SILENCE?

C. WHETHER THERE WAS SUFFICIENT EVIDENCE PRESENTED TO THE JURY TO SUPPORT CONVICTIONS FOR TWO BURGLARIES, TWO LARCENIES AND ONE CONSPIRACY?

D. WHETHER BREAKING AND ENTERING A DWELLING HOUSE IS THE SAME CRIME REGARDLESS OF WHETHER IT WAS PERFORMED DURING THE NIGHT OR DAY?

E. WHETHER THERE IS CUMULATIVE ERROR WHERE THE PETITIONER PROVES NO SINGLE ERROR?

IV. TABLE OF AUTHORITIES.

V. ARGUMENT.

A. EVIDENCE OF EACH OF FOUR BURGLARIES FOR WHICH THE DEFENDANT WAS BEING TRIED IN A UNITARY TRIAL WAS PROPERLY NOTICED AND ADMITTED AND EVIDENCE THAT THE APPELLANT WAS WEARING A NECKLACE IDENTIFIED AS THE PRODUCT OF A BURGLARY WAS PROPERLY ADMITTED WITHOUT OBJECTION IN CONFORMITY WITH THE TRIAL COURT'S PRE-TRIAL RULING.

1. State's Objection to Appellant Raising Unobjected-to Issues.

The Appellant admits that he did not object to these issues at trial. [Appellant's Brief, 15.] Neither did the Appellant file a Notice of Intent to Appeal. [5] The appellee State of West Virginia objects to this Honorable Court considering this issue raised for the first time on appeal. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. Syl. Pt. 2, State ex rel. Cooper v. Caperton, 196 W. Va. 208, 470 S.E.2d 162 (1996)." Syl. Pt. 1, State v. Rodoussakis, 204 W. Va. 58, 511 S.E.2d 469 (1998).

This Court additionally holds that:

> 2. As a general matter, a defendant may not assign as error, for the first time on direct appeal, an issue that could have been presented initially for review by the trial court on a post-trial motion. [and]

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[5] **W.V.R.App.Pro.** 3(b) reads:

> No petition from a criminal case shall be presented unless a notice of intent to appeal shall have been filed with the clerk of the circuit court in which the judgment or order was entered within thirty days from the entry of such judgment or order. The notice of intent to appeal shall concisely state the grounds for appeal.

See also: **W.V.R.Cr.P.** 37(b) (notice of intent to appeal to be filed within thirty days of entry of judgment).

> 3. When a defendant assigns an error in a criminal case for the first time on direct appeal, the state does not object to the assignment of error and actually briefs the matter, and the record is adequately developed on the issue, this Court may, in its discretion, review the merits of the assignment of error.

Syl. Pts. 2 and 3, State v. Salmons, 203 W. Va. 561, 509 S.E.2d 842 (1998).

Were the Court to review this matter over the State's objection, the State requests that this Court reject the Appellant's argument and affirm the judgment below.

2. Standard of Review.

This Court holds:

> """The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard." Syllabus Point 1, in part, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).' Syllabus Point 9, *Smith v. First Community Bancshares, Inc.*, 212 W.Va. 809, 575 S.E.2d 419 (2002)." Syllabus Point 2, *State v. Harris*, 216 W.Va. 237, 605 S.E.2d 809 (2004).

Syl. Pt. 1, State v. Cyrus, — W.Va. —, — S.E.2d — (Slip Op. No. 33453, decided 2/20/08).

3. Discussion.

The Appellant had a unitary trial concerning four residential burglaries (the fifth burglary was severed for trial purposes by the State.) A unitary trial was not objected to by the Appellant nor is it a matter raised on appeal. A unitary trial, *per se*, is not erroneous. This Court holds that "A defendant is not entitled to relief from prejudicial joinder pursuant to Rule 14 of the West Virginia Rules of Criminal Procedures when evidence of each of the crimes charged would be admissible in a separate trial for the other." Syl. Pt. 2, State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998).

As a unitary trial, evidence of each of the four burglaries was properly admitted at trial. Despite this proper backdrop, the Appellant complains that the State, by referencing these burglaries in the plural and characterizing the commission of these burglaries by the Appellant and his co-defendants as a "burglary ring," somehow introduced evidence of "other crimes, wrongs or acts," in violation of **W.V.R.E.** 404(b). The Appellant's assertion is not supported by the record and should be rejected.

The Appellant plainly acknowledges that the circuit court conducted the required pre-trial hearing on the State's Notice of Intent to Use 404(b) evidence. The State argued that the evidence that a necklace stolen in a burglary, which necklace was seized from the Appellant's neck when recognized in plain view by police while they were questioning the Appellant about the burglaries, was intrinsic to the crimes. The pre-trial order plainly indicates that the Appellant did not contest the admissibility of his statements and allowed the evidence concerning the stolen necklace to be presented by proffer without refutation. The Appellant plainly acknowledges that the circuit court then ruled that the statement the Appellant gave to police that he denied involvement in the burglaries was admissible and that the "plain-view" seizure of the stolen necklace from the Appellant during that statement was also admissible.

The Appellant's possession of a necklace wrought from a burglary at the very time he was denying involvement in the burglaries was plainly relevant to the burglaries and to the veracity of his statement to police. The Appellant's possession of the necklace was inextricably intertwined with the indicted crimes. In State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996), this Court held that evidence which is "intrinsic" to an indicted charge is not governed by Rule 404(b):

> In determining whether the admissibility of evidence of

> "other bad acts" is governed by Rule 404(b), we first must determine if the evidence is "intrinsic" or "extrinsic." *See United States v. Williams*, 900 F.2d 823, 825 (5th Cir.1990): "'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." (Citations omitted). If the proffer fits into the "intrinsic" category, evidence of other crimes should not be suppressed when those facts come in as *res gestae*--as part and parcel of the proof charged in the indictment. *See United States v. Masters*, 622 F.2d 83, 86 (4th Cir.1980) (stating evidence is admissible when it provides the context of the crime, "is necessary to a 'full presentation' of the case, or is . . . appropriate in order 'to complete the story of the crime on trial by proving its immediate context or the "res gestae"'"). (Citations omitted).

196 W.Va. at 312 n.29, 470 S.E.2d at 631 n.29.

LaRock further held that "historical evidence of uncharged prior acts which is inextricably intertwined with the charged crime is admissible over a Rule 403 objection." 196 W.Va. at 313, 470 S.E.2d at 632. This is so because "Rule 403 was not intended to prohibit a prosecutor from presenting a full picture of a crime especially where the prior acts have relevance independent of simply proving the factors listed in Rule 404(b)." *Id.* *See also*: State v. Cyrus, *supra*, — W.Va. —, — S.E.2d — (Slip Op. No. 33453, decided 2/20/08).

The trial court had before it, and the State provided in its Notice, that the necklace was later determined to have come from a Morgan County burglary. The trial court's pre-trial order allowed admission of the seizure of the necklace but limited the State from eliciting evidence that the necklace was later determined to have come from a *Morgan County* burglary. The Appellant claims that the State, by referencing the necklace, without objection, during trial somehow violated the circuit court's pre-trial order.

The Appellant acknowledges that at no time during trial was there any mention of the necklace having come from a Morgan County burglary. The State plainly provided the trial court with its information about the origin of the necklace at pre-trial and plainly abided by the trial court's pre-trial ruling at trial. The Appellant proves no violation of the provisions of **W.V.R.E.** 404(b).[6]

The State requests that this Court affirm the Appellant's jury trial conviction.

B. THE DEFENDANT'S DENIAL TO POLICE IN AN INTERVIEW THAT HE WAS INVOLVED IN BURGLARIES WAS NOT AN EXERCISE OF HIS FIFTH AMENDMENT RIGHT TO SILENCE.

1. State's Objection to Appellant Raising Unobjected-to Issues.

For the reasons stated in Argument A, *supra*, the appellee State of West Virginia objects

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[6]Since the Appellant cannot refute the fact that he did not object to the admissibility of his statements or the admissibility of the necklace, the Appellant now claims that it was "plain error" for the Court to have allowed their admission. However, the plain error allegation is founded upon factual misrepresentations. Those misrepresentations are, once again, that the State violated the pre-trial order by referencing the necklace as the product of a burglary when, in fact, the State abided by the letter of that pre-trial order, and that there was no 404(b) hearing conducted, when in fact, that hearing was conducted on February 4, 2005, and resulted in the pre-trial order entered on February 15, 2005.

This Court holds:

> An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, State v. LaRock, *supra*. There was no "plain error" as alleged.

to this Honorable Court considering this issue raised for the first time on appeal. State v. Rodoussakis, *supra*, 204 W. Va. 58, 511 S.E.2d 469 (1998); State v. Salmons, *supra*, 203 W. Va. 561, 509 S.E.2d 842 (1998).

Were the Court to review this matter over the State's objection, the State requests that this Court reject the Appellant's argument and affirm the judgment below.

2. Standard of Review.

> Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995).

3. Discussion.

The facts are plain that the Appellant denied to police during investigation that he had any involvement with any burglaries. As a pre-trial issue, the trial court allowed admission of this denial, without challenge from the Appellant. [Pre-trial Order, 2/15/05.]

On direct examination by the State, State Trooper Brian Bean testified that:

> We went to the jail to talk to Mr. Noll. At one of the burglary sites she [Amanda Schultz] mentioned that a piece of jewelry she had was a gold cross that had been stolen and that Mr. Noll was wearing it when he was arrested. At the jail they let you keep jewelry if it is religious oriented so he still had the piece of jewelry around his neck.

[Tr., 2/8/05, at 190.]

Moments later, on cross-examination by the Appellant, Trooper Bean was asked, "Now when you questioned Mr. Noll about his involvement in this he emphatically denied involvement, correct?" The response was "Yes." [Id., at 191.]

The State followed on re-direct with: "Trooper Bean, specifically when you go to interview an individual, as you did with Mr. Noll, are they always forthcoming with information?" Trooper Bean answered, without objection, "No, ma'am." [Id., at 192.]

The fact that the Appellant gave a statement to the police denying involvement in the burglaries was used by the Appellant in his cross-examination of Trooper Bean to emphasize his innocence. The State properly countered that suggestion by inquiring of the police officer about his experience in the ability of criminal suspects to be "forthcoming." This inquiry was neither objectionable nor a comment upon the Appellant's Fifth Amendment right to remain silent. The Appellant did not exercise his right to remain silent. He told the police that he was not involved in the crimes they were investigating. The Appellant tried to use this to his benefit at trial.

In closing argument, the State went after the Appellant's credibility in denying to Trooper Bean his involvement in the burglaries. The State did not speak of the Appellant exercising his right to not testify before the jury. Such comments are barred. State v. Murray, 220 W. Va. 735, 649 S.E.2d 509 (2007). The State spoke only of the Appellant's cross-examination of Trooper Bean and the testimony the Appellant elicited regarding his denial of involvement in the burglaries. The State raised the Appellant's denial to Trooper Bean in the context of other testimony regarding the heroin habit the Appellant and his girlfriend, Amanda Schultz, were trying to support and in the context of the Appellant's possession of the stolen necklace found around his neck:

> Now, you also know that the heroin habit is real because Brian Bean who is a member of the Task Force told you that. Brian Bean also told you something else, Mr. Noll denies any responsibility for any of the burglaries, he denies it, yet around his neck is a gold chain which turned out to be from a burglary. He knows a whole lot more in that respect. I asked Brian Bean specifically, I said, did they always tell you everything they know when you go to interview them. His answer was, no, they don't but Amanda Schultz did. She did the only thing she could do once she was caught, she gave us all of the information that she had. She told us what she knew.

[Tr., 2/09/05, at 36-37.]

Applying the four Sugg factors, there is no error proved by the Appellant. First, the State's comments were not misleading, since the State was permissibly drawing to the jury's attention the improbability of the Appellant's denial to Trooper Bean, given the evidence of motive (heroin habit) provided by Bean and the Appellant's girlfriend, Amanda Schultz, and evidence of the Appellant's possession of the stolen necklace. Second, the testimony elicited by the Appellant, and then referenced by the State, as to the Appellant's denial were both limited in scope before the jury. Third, the testimony of the Appellant's girlfriend regarding the Appellant's involvement in the burglaries was sufficient to establish the guilt of the Appellant. *See*: State v. Vance, 164 W.Va. 216, 220, 262 S.E.2d 423, 426 (1980). Fourth, the evidence of a false denial by the Appellant was not an extraneous matter but is tangible evidence which the jury could properly consider in their deliberations. The Appellant fails to prove error. Sugg.

The State requests that this Court affirm the Appellant's jury trial conviction.[7]

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[7]The Appellant also claims that the State's attempt to introduce a photo array was improper. [Appellant's Brf., 18.] The record reflects that the State asked County Deputy Sheriff Lt. Bohrer to identify an exhibit, which he identified as a photo array of houses from which the co-defendant Amanda Schultz was asked to identify houses where she had information of crimes having been committed. The Appellant immediately objected to publishing the array to the jury

C. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO THE JURY TO SUPPORT CONVICTIONS FOR TWO BURGLARIES, TWO LARCENIES AND ONE CONSPIRACY.

1. Standard of review.

The standard of review utilized by this Court when reviewing the denial of a motion for acquittal is:

> "'Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.' *State v. West*, 153 W. Va. 325 [168 S.E.2d 716] (1969)." Syllabus Point 1, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).

Syl. Pt. 3, State v. Taylor, 200 W. Va. 661, 490 S.E.2d 748 (1997).

This standard of review for a motion for acquittal, where the "question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt", *id.*, differs slightly from the standard of review when reviewing the sufficiency of the evidence supporting a conviction. The standard for reviewing the sufficiency of evidence to support a conviction is :

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long

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since only two of the homes were linked to the indicted crimes. The State did not attempt to publish or admit the array. [Tr., 2/08/05, at 198-199.] This is neither appealable error or an improper remark of the Prosecuting Attorney.

> as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled. Syllabus Point 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998); Syl. Pt. 3, State v. Williams, 198 W. Va. 274, 480 S.E.2d 162 (1996); Syl. Pt. 2, State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

The specific inquiry of the appellate court in reviewing the sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of a crime proved beyond a reasonable doubt:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Syl. Pt. 1, *State v. Guthrie*, [*supra*].

Syl. Pt. 1, State v. Hughes, *supra*.

2. Discussion.

The trial court properly exercised its discretion in denying the Appellant's motions for acquittal based on the evidence presented at trial, as viewed in a light most favorable to the State. The Appellant was found guilty at jury trial of the burglary and larceny of the Frye's home and of the Land's home. The Appellant was also found guilty of conspiracy to commit burglary. The Appellant was acquitted of the burglary and larcenies of the Kipps' and Hick's homes.

There was no dispute that the Frye's home and the Land's home were broken into and certain items stolen. Mr. Frye testified as to the property stolen from his burgled homes: an X-box system; Seiko watch; portable air compressor; camcorder, Nikon camera in a leather bag; [Tr., 2/8/05, 109-118.] Ms. Land testified as to property stolen from her burgled home: two boxes of jewelry with their identified contents. [Id., 119-128.]

The only real question at trial was whether there was sufficient evidence that *the Appellant* committed the crimes. That evidence, as with most trials, was circumstantial. The testimony before the jury from Troopers Bird and Burkhart regarding the burglaries at the Frye's and the Land's was that Amanda Schultz identified certain homes that were burglarized by the Appellant, including the Frye's and the Land's. [Tr., 2/8/05, 150-153; 161-164.] They also testified that Ms. Schultz assisted in the recovery of some of the property identified as stolen from the Frye's and the Land's. [Id., 152; 164-165.]

Trooper Bean testified that Ms. Schultz cooperated by showing the police various homes in the area that were burglarized and that Ms. Schultz described a piece of jewelry taken. He further testified that the Appellant denied involvement in the burglaries but was wearing that piece of jewelry when he was interviewed. [Id., 188-193.]

Amanda Schultz herself testified that she has been with the Appellant for eleven years and has three kids with him. She testified that she took a plea and agreed to cooperate with the State and accompanied law enforcement officers regarding homes that were burglarized. She identified photographs of certain homes that the Appellant showed her or told her that he had broken into with Aaron Rockwell. She testified that the property was sold or traded for drugs and that she and the Appellant are heroin users. [Id., 203-260.]

Ms. Schultz was the linchpin to the Appellant's involvement in these crimes. The jury could properly base its conviction of the Appellant upon the testimony of Ms. Schultz. *See*: State v. Vance, *supra*, 164 W.Va. 216, 220, 262 S.E.2d 423, 426 (1980). Ms. Schultz related statements made to her by the Appellant regarding the burglaries he committed with Aaron Rockwell. Ms. Schultz had information about the location of some of the stolen property, which she said she knew about because she was with the Appellant when it was disposed of. Although the Appellant challenged Ms. Schultz' credibility on cross-examination with her criminal history, her plea agreement, her drug use and her relationship with the Appellant, the ultimate issue of her credibility lay with the jury. "Credibility determinations are for a jury and not an appellate court." Syl. Pt. 1 (in part), State v. Miller, *supra*; Syl. Pt. 3 (in part), State v. Williams, *supra*; Syl. Pt. 2 (in part), State v. Hughes, *supra*.

The jury considered this evidence sufficient to find the Appellant guilty beyond a reasonable doubt of these two burglaries, the associated larcenies and a conspiracy. This evidence was sufficient for the trial court to deny the motions for acquittal under the standards of State v. Taylor, *supra*, 200 W. Va. 661, 490 S.E.2d 748 (1997) and State v. Miller, *supra*, 204 W. Va. 374, 513 S.E.2d 147 (1998). "[A] jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt." Miller. This evidence was sufficient to support the conviction.

The State requests that this Court affirm the Appellant's jury trial conviction.

D. BREAKING AND ENTERING A DWELLING HOUSE IS THE SAME CRIME REGARDLESS OF WHETHER IT WAS PERFORMED DURING THE NIGHT OR DAY.

1. State's Objection to Appellant Raising Unobjected-to Issues.

For the reasons stated in Argument A, *supra*, the appellee State of West Virginia objects to this Honorable Court considering this issue raised for the first time on appeal. State v. Rodoussakis, *supra*, 204 W. Va. 58, 511 S.E.2d 469 (1998); State v. Salmons, *supra*, 203 W. Va. 561, 509 S.E.2d 842 (1998).

Were the Court to review this matter over the State's objection, the State requests that this Court reject the Appellant's argument and affirm the judgment below.

2. Standard of Review.

> "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

State v. Brooks, — W. Va. —, — S.E.2d — (Slip Op. No. 33662; decided 5/23/08).

3. Discussion.

The State's burglary statute, **W. Va. Code** § 61-3-11(a), reads:

> (a) Burglary shall be a felony and any person convicted thereof shall be confined in the penitentiary not less than one nor more than fifteen years. If any person shall, in the nighttime, break and enter, or enter without breaking, or shall, in the daytime, break and enter, the dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be deemed guilty of burglary.

The Appellant was indicted for the nighttime burglary of Mr. Frye's home. [Indictment, Count Three.] The testimony of Mr. Frye reflected that his home was broken into during the day. [Tr., 2/8/05, 107.] The offense is the same whether the Appellant broke into Mr. Frye's home

during the day or night. **W. Va. Code** § 61-3-11(a). The one-to-fifteen year sentence is the same regardless of whether the Appellant broke into Mr. Frye's home during the day or night. *Id.* The statute of jeofailes, **W. Va. Code** § 62-2-11, corrects any alleged problem related to Count Three of the Indictment. *See* State ex rel. Thompson v. Watkins, 200 W.Va. 214, 488 S.E.2d 894 (1997).

The Appellant was also indicted for the entering without breaking in the daytime Ms. Land's home. [Indictment, Count Five.] The testimony of Ms. Land reflected that her home was broken into while she was away between 4 o'clock one afternoon and noon the following day. Her testimony also reflected that her home was locked when she left. [Tr., 2/8/05, 1119-120.] The penalty for entering without breaking a residence in the daytime is not less than one nor more than ten years. **W. Va. Code** § 61-3-11(b). Though the Appellant has never objected to the sentence imposed, never filed a motion with the trial court to correct this aspect of his sentence, and is currently paroled, to the extent that the Appellant was inadvertently sentenced to one-to-fifteen (1-15) years for his conviction on Count Five, a sentence correction to the statutory one-to-ten (1-10) year sentence for this Count can easily be made upon proper motion to the circuit court upon remand for this sole purpose.

The State requests that this Court affirm the Appellant's jury trial conviction.

E. THERE IS NO CUMULATIVE ERROR WHERE THE PETITIONER PROVES NO SINGLE ERROR.

1. Standard of Review.

The cumulative error doctrine does not apply where no error is shown. State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996).

2. Discussion.

The Appellant fails to prove *any* alleged error. The Appellant proved no cumulative error that could have affected the outcome of his trial. The State requests that this Court affirm the Appellant's jury trial conviction. Knuckles, *supra*.

VI. CONCLUSION.

For the foregoing reasons, this Court is respectfully requested to affirm the Appellant's jury trial conviction.

Respectfully submitted,
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by counsel,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing Brief of Appellee State of West Virginia on this the 24th day of June, 2008, by __ hand-delivery, _x_ first-class mail, postage prepaid, __ facsimile to:

Margaret B. Gordon, Esq.
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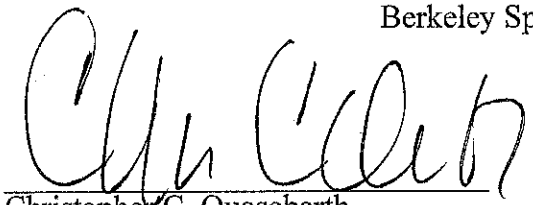

Christopher C. Quasebarth